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442569—42

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 870

SAMUEL BERNSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 839–844) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 17, 1941 (R. 844). The petition for a writ of certiorari was filed January 16, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See

also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether there was error in admitting material evidence which may have suggested that petitioner had previously been charged with other offenses or arrested therefor.

2. Whether the trial court's rulings on the admission of evidence and its charge to the jury resulted in trying petitioner for offenses not charged in the indictment.

STATUTE INVOLVED

21 U. S. C. 174 provides:

> If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall, upon conviction, be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains

the possession to the satisfaction of the jury.

STATEMENT

Petitioner and four others were indicted on June 4, 1940 (R. 3), in the Eastern District of New York on two counts charging violations of 21 U. S. C. 174 (R. 8–9). The first count alleged that they concealed and facilitated the concealment of three grains of morphine, knowing that it had been imported contrary to law, and the second charged that they concealed and transported and facilitated the concealment and transportation of 39 ounces of morphine, knowing that it had been so imported.

Motions for severances and separate trials on behalf of the defendants Cohen, Lorber, and Angelson were denied (R. 10–12, 16–17, 30). Upon the motion of the Government, the court granted a severance as to the defendant Weiss (R. 31). Petitioner made no equivalent motion before trial (R. 840), but on four occasions during trial moved for a mistrial and severance (R. 57, 96, 268, 738).

The defendants were convicted upon both counts of the indictment (R. 5, 770). Petitioner was sentenced to ten years' imprisonment and to pay a fine of $500 on each count, the sentences of imprisonment to run concurrently (R. 6, 786). The convictions were affirmed by the Circuit Court of Appeals (R. 839–844).

As more fully appears at page 8, *infra,* the evidence showed that at petitioner's instance (R. 94–95), one Louis Adelman,[1] through defendant Lorber, procured quantities of morphine from defendant Cohen (R. 102–108, 115–118), which were given by Adelman or Schildwach to petitioner (R. 107–109, 117–118, 127–128). Petitioner "duplicated" the morphine, that is, made two ounces out of one (R. 109–111, 127–135), and delivered the completed product to other defendants (R. 111, 137, 142–143). Some of his equipment was purchased with funds advanced by Cohen (R. 121–122). Particles of morphine were found adhering to the utensils used by petitioner (R. 38–46, 129–135, 330–333), which were seized by federal narcotics agents in Adelman's apartment (R. 38–42, 164, 329, 364).

ARGUMENT

I

Petitioner argues (Pet. 2–5, 11–12) that certain testimony of Adelman and the narcotics agents concerned prior unrelated criminal charges against him or arrests therefor and thus served to put his character in issue. He contends that this was improper because he did not testify or place his character in question and also because

[1] Adelman and one Schildwach were convicted under a prior indictment. See *United States* v. *Adelman*, 107 F. (2d) 497 (C. C. A. 2).

the crime for which he was on trial did not involve intent or motive.

It is at once apparent, however, that such of this testimony as was received was properly admitted. Petitioner objects (Pet. 4) to the statement made by Adelman, a Government witness (R. 91), to the effect that he had been held as a witness against petitioner many years before (R. 248). This statement, however, was made on cross-examination in response to a question by counsel for two of petitioner's co-defendants (see R. 13, 31, 233). Petitioner's counsel immediately moved for a mistrial and when this was denied he requested the court to instruct the jury concerning the statement. The court accordingly instructed the jury that the statement had no bearing upon the issues before it and should not be considered in its deliberations. (R. 248–249, 843.) At the time counsel for the co-defendants was attempting to impeach the credibility of the witness (see R. 239–251). Especially in view of the court's specific instruction to the jury, it is obvious that no prejudice to petitioner resulted from this incident.[2]

[2] Petitioner also refers (Pet. 2) to the testimony of Adelman that petitioner handled the narcotics which were the subjects of the two counts of the indictment (R. 107–109, 111, 116–117, 127–128, 135, 140) and to the testimony of Adelman's wife and sister-in-law that petitioner had been to their homes with Adelman (R. 343–344, 359–362). This evidence was clearly admissible and we do not understand petitioner to contend that it was not.

Petitioner also objects (Pet. 3–4) to testimony of narcotic agents Olivera and Rogers which disclosed that he was arrested in March 1940, prior to the return of the indictment in the instant case, on what petitioner asserts was an unrelated charge (R. 718, 739). As is apparent from the extract from agent Olivera's testimony quoted in the petition (p. 3), the reference to the arrest was made merely in explaining the circumstances which led up to petitioner's consent to the search of his premises by the agents. While the articles taken from petitioner's premises as a result of this search were not admitted because the Government was unable to prove which of them were owned by petitioner and which belonged to his son (R. 721–723, 734, 790), petitioner did admit to the agents that "most" of the articles were his (R. 719, 721). Clearly, testimony as to this admission was admissible, since it tended to show that petitioner had in his possession apparatus which was apparently suitable for utilization in the morphine duplicating process. Hence, the testimony concerning the circumstances under which the admission was made was also admissible.[3]

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[3] Germane evidence is, of course, not rendered inadmissible simply because it may also indicate the commission of other crimes. *Moore* v. *United States*, 150 U. S. 57, 61; *Devoe* v. *United States*, 103 F. (2d) 584, 588 (C. C. A. 8), certiorari denied, 308 U. S. 571; *Suhay* v. *United States*, 95 F. (2d) 890, 894 (C. C. A. 10), certiorari denied, 304 U. S. 580; *Dysart* v. *United States*, 270 Fed. 77, 79–80 (C. C. A. 5), certiorari denied, 256 U. S. 694.

It is difficult to discern upon what ground petitioner objects (Pet. 4–5) to agent White's testimony that he told defendant Lorber that he was looking for a man named "Sammy" (R. 53). White's testimony regarding his conversation with Lorber was received only as against the latter (R. 48, 50); and White in no way connected his search with any crime other than that for which petitioner was on trial (see R. 37–40, 46–53). When White indicated that he was going to recount the details of this conversation with Lorber he was immediately cut off by the prosecutor before anything damaging to petitioner was said (R. 53).

II

Petitioner asserts (Pet. 5–7, 12–14) that the trial court's rulings admitting certain items of evidence as against other individual defendants and the court's instructions to the jury confused the issues and that the jury was led, particularly by the instructions, to believe that petitioner was charged not only with concealment and transportation of narcotics, but with conspiracy, manufacture, and sale as well. Examination of the alleged errors, however, shows that the trial court's rulings and charge were correct and that they in fact actually favored petitioner.

As the court below pointed out (R. 841), the evidence clearly revealed the existence of a joint enterprise or conspiracy among the defendants,

although such was not charged in the indictment. Petitioner informed Adelman that he had a process whereby he could "duplicate" a given amount of morphine, that is, make two ounces out of one, if he could be put in contact with somebody who would finance the operation (R. 94–95). Adelman approached defendant Lorber (R. 95–96, 99), who was instrumental in getting defendant Cohen to give an ounce of morphine to Adelman (R. 102, 106–108). The latter, in turn, gave it to Schildwach (R. 108), who delivered it to petitioner (R. 109). Petitioner made this into two ounces and gave it to Adelman (R. 109–111). Subsequently Cohen gave Adelman seventeen ounces of morphine in Lorber's presence and Adelman gave this to petitioner (R. 115–117). Cohen also gave twenty-two additional ounces to Adelman (R. 117–118) and advanced $40 to buy equipment for petitioner (R. 121–122). Defendant Angelson's car was used to transport this equipment to Adelman's apartment, where petitioner performed the duplicating process (R. 123–135). It was agreed that Cohen and one Weiss were to receive fifty percent of the profits, petitioner twenty-five percent, and Adelman, Schildwach, Lorber, and Angelson six and one-quarter percent each (R. 155–156).

It is settled, of course, that if a conspiracy is shown, the acts and declarations of one defendant, outside the presence of his co-defendants but in course of the conspiracy, are admissible against

the latter even though a conspiracy is not charged in the indictment. *Hitchman Coal and Coke Co.* v. *Mitchell,* 245 U. S. 229, 249; *Lincoln* v. *Claflin,* 7 Wall. 132, 139; *Quercia* v. *United States,* 70 F. (2d) 997, 998–999 (C. C. A. 1), reversed on other grounds, 289 U. S. 466; *Friscia* v. *United States,* 63 F. (2d) 977, 981 (C. C. A. 5), certiorari denied, 298 U. S. 762; *Zarate* v. *United States,* 41 F. (2d) 598, 599 (C. C. A. 5), certiorari denied, 282 U. S. 867. Therefore, the items of evidence complained of (Pet. 7) could have been admitted against petitioner as well as against the defendants to whom they specifically related.[4] Petitioner was, consequently, favored in view of the admission of the evidence only as against other defendants.

Nor is there any merit in petitioner's argument (Pet. 6, 13) that the trial court's charge to the

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[4] Moreover, even if no conspiracy were proved, the evidence in question was admissible against petitioner by virtue of the statute making accessories responsible as principals (18 U. S. C. 550), to show that petitioner aided and abetted the commission of the crimes charged in the indictment. Under this statute an accessory may be charged directly with the commission of the crime and such an indictment is supported by evidence that he aided in its commission. *Jin Fuey Moy* v. *United States,* 254 U. S. 189, 192; *Backun* v. *United States,* 112 F. (2d) 635, 636–637 (C. C. A. 4); *United States* v. *Hodorowicz,* 105 F. (2d) 218, 220 (C. C. A. 7), certiorari denied, 308 U. S. 584; *Greenberg* v. *United States,* 297 Fed. 45, 48 (C. C. A. 8); *Remus* v. *United States,* 291 Fed. 513, 518 (C. C. A. 6), certiorari denied, 263 U. S. 717; *Harris* v. *United States,* 273 Fed. 785, 790 (C. C. A. 2), certiorari denied, 257 U. S. 646.

jury permitted petitioner to be tried not only for concealment and transportation, but for conspiracy, manufacture, and sale of narcotics as well. Petitioner did not except to the charge (R. 763); and a full reading of it shows that the two excerpts of which petitioner complains (Pet. 6) were proper discussion of the background of the crimes charged in the indictment. The court in these excerpts was simply summarizing the *modus operandi* of the defendants. At the outset of its instructions the court advised the jury in precise terms of the particular charges for which the defendants were on trial (R. 747–748). The court also specifically instructed the jury that "The conduct of other people is not before you. The possible commission of crime by other persons is not before you, and the possibility of the commission of a crime by any of these defendants, not charged in this indictment, is not before you. Your inquiry is centered and directed solely to the charges that I have already outlined * * *." (R. 757–758).[5]

CONCLUSION

The case was correctly decided below, there is no conflict of decisions, and no important question of law is involved. We therefore respectfully

[5] See also petitioner's requested instructions Nos. 18, 19, and 22 which were granted (R. 768–769).

submit that the petition for a writ of certiorari should be denied.

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